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THE SMALL RETAILER AND THE ROBINSON-PATMAN ACT

BY

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BACHELOR OF ARTS---SAMUEL HUSTON COLLEGE, 1940

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ADMINISTRATION AT BOSTON UNIVERSITY---1947

Approved by:

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Ass't Prof. of Econ.

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PREFACE

My desire to investigate the circumstances surrounding the small businessman was stimulated by the fact that many men returning from the military services have started their own businesses and hope to survive.

Since there may be a high rate of failure among these new enterprises, I have set out to determine what the sources of assistance are for businesses in this category. A brief survey of the field revealed that private aid is limited, hence I turned to the Government and there found a number of Federal and State laws designed to protect and aid small businesses.

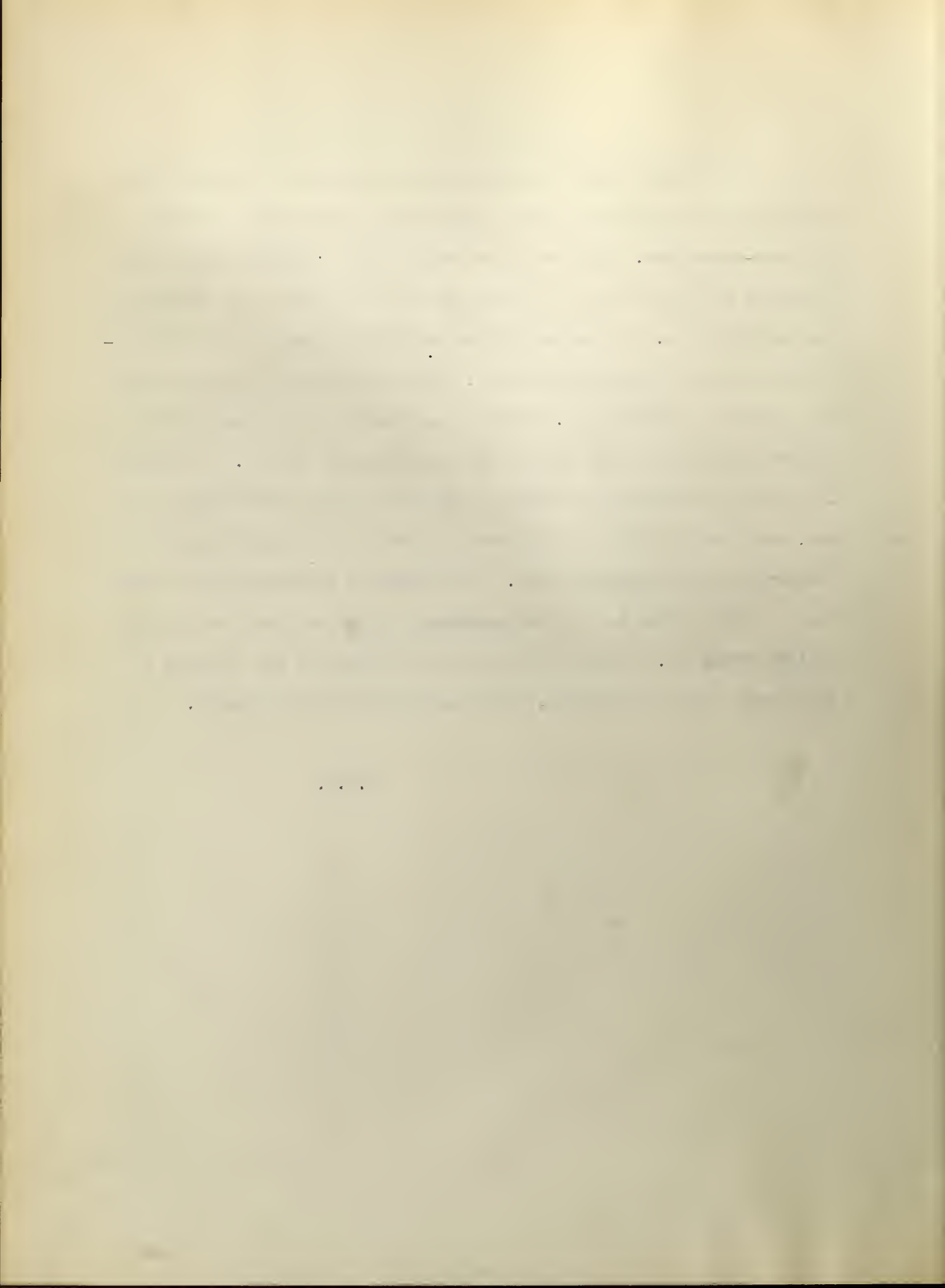
I cannot here discuss all of the measures which have been introduced during the period from 1932 to the present, but a careful examination of all of those that have become Law, and especially those that have or are capable of having a direct effect upon small business problems, has been made.

In this paper I have chosen to discuss the Robinson-Patman Act and its relationship to the small retailer. This Act has received severe criticisms from both economic and legal analysts. They charge that it is ambiguous, unworkable and does not accomplish the purposes for which it was written. These charges are denied by the proponents of the Act. The latter group contends that the bill regulates business activity, promotes free competition and enables the small retailer to maintain a fair share of the distribution market.



The first chapter of this thesis is devoted to a study of the economic conditions in the retail field prior to the enactment of the Robinson-Patman Law. The reason for making this background study is to determine what the factors were that caused the agitation for changes in the existing laws. The second chapter presents the text of the Robinson-Patman Act and outlines its purposes. Chapter III contains the pro and con arguments about the Law. These are presented for the purpose of ascertaining which of its aspects are controversial and why. In Chapter IV there is an abbreviated report of the leading cases tried under the Act, and lists of rulings which have been made by the Federal Trade Commission and the Supreme Court. The reason for presenting these cases is, to show how this Law is interpreted by those who have the duty of administering it. Chapter V consists of a summary of the findings in this study and my conclusions, based upon the facts as presented.

E.W.P.



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CHAPTER I

THE ECONOMIC BACKGROUND TO THE ROBINSON-PATMAN ACT

The Sherman Anti-trust Act and the Clayton Act were the first Laws passed by the United States Congress which were designed to prevent the domination of commerce and trade by large business organizations. The Clayton Act has, for more than 20 years, been the main Federal Law governing price differentials in interstate commerce. Its provisions were adequately understood by all who were concerned, Therefore very little trouble was had in administering it.

At the time the Clayton Act became law, there did not exist the problem of regulating retail distribution, therefore its provisions were not directed to this end. Although chain organizations were in existence as early as 1890, they were not recognized as a probable source from which economic mal-adjustments could arise.

Between the years of 1918 to 1932 the chain store movement spread rapidly and invaded the field of retail distribution with a tremendous impact. During the course of the chain store expansion, many small independent dealers were either forced out of business entirely or found their profit margins reduced to a minimum.

The independent merchants became annoyed with the methods used by chains in acquiring trade and rendering services to the buying public. Therefore, they demanded aid from the Government. As before stated, the Clayton Act was the only existing law which dealt with unlawful trade practices, and it did not designate specifically what actions were unlawful, nor did it outline in detail what types of organization over which it had jurisdiction.

Because of these, and many other weaknesses, not herein named, the chain organizations could successfully avoid the Clayton Act and carry on without restrictions.

In 1928 the complaints against chains became so numerous, Congress authorized the Federal Trade Commission to make an investigation of all chain-store activities and to submit periodic reports at each session of Congress. In a later session, Congress appointed a Committee, headed by Representative Patman, to investigate the lobby group known as the American Retail Federation, to see if its contentions were made in good faith.

The findings of the above-mentioned investigations formed the groundwork for the formation of the Robinson-Patman Act.

A. SIZE AND EXTENT OF THE CHAIN STORE SYSTEM

First, let us examine the chain store holdings to determine actually how large they were, and how much of the retail field they controlled.

According to the census reports,¹ there were in operation in the United States, in 1929, 1,543,158,000 retail stores with a total sales of over \$49,000,000,000. These stores were classified into various groups according to methods of operation. The principal groups being designated as single stores (independents), two and three store independents (local branch systems operated from a dominant parent store), local chains (four or more local stores with a central warehouse) sectional chains (with stores in more than one city but entirely in one geographical area), and national chains (with stores in more than one section of the country).

1. U.S. Bureau of the census- Sec. on retail distribution-1930

There were 7,060¹ chain store organizations in 1929 operating 159,638 stores or about 10% of all the retail stores in the country. Sales of these chains aggregated over ten-billion dollars or about 22% of the total annual retail sales. Local chains operated 52,465 stores with a total annual sales of three-billion dollars; sectional chains operated 41,465 stores and had sales of a little over two billion dollars; while national chains operated 51,058 stores with sales of three billion nine million dollars annually. Other types of chains² not included in this class operated 15,032 stores with sales of one billion two million dollars.

A tabulation of these figures shows that chains comprise 9.4% of the total number of stores and made 19.2% of the total annual sales. In short, 20 cents out of every dollar spent in retail stores by the consumer went to the chain stores. The small chains with two to five stores comprise more than half the total number of chains but operated less than 5% of the total number of stores, while the chains with one thousand or more stores comprised less than 1% of the chains but operated more than one-half of the stores and earned about 40% of the total sales.

The three largest national grocery store chains, namely, The Great Atlantic and Pacific Tea Company, The Kroeger Grocery and Baking Company, and The Safeway Stores Inc. operated during 1930, nearly 25,000 grocery stores and earned an aggregate sales of \$1,600,000,000. The Great

1. Final report of the FTC.-in 1929, p. 7

2. "Other types" include; mail order houses, road side markets etc.

Atlantic and Pacific Tea Company operated 15,738 of these stores with a total sales of one billion sixty-five million dollars.

The above figures indicate how large the chain store systems were and what percentage of the total retail sales they commanded. The figures also serve as a basis for comparison between the holdings of independents and chains and show the extent of control each group has over the retail market.

In a comparative study made by the Bureau of Social and Business Research¹, in the city of Buffalo, New York, it was revealed that the opening rate of independent stores in that city was much higher than that of chain stores but that the rate of closings among independents was nearly as high as the opening rate, whereas the rate of closings among chains was roughly one-fourth their opening rate. Observing this fact from a nation wide point of view, we can assume that this one fact accounts for some of the great differences in the total number of stores operated by each group.

We have so far discovered the size and the extent of sales control exercised by the chain organizations. Let us now examine the methods they used in obtaining this end.

B. METHODS OF GROWTH

The first method generally used by chains is internal expansion. The expansive power of their organization manifests itself in the opening

1. University of Buffalo, Business Research Bulletin-Mar. 1930

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of new stores as distinguished from acquisition of stores already in existence under other ownership. During the thirty year period, 1900 to 1930, 1,597 chains opened 51,565 new stores and acquired 6,475 or a total of 58,040. In short this means that 89 per cent represents actual opening of new stores. The Great Atlantic and Pacific Tea Company, the largest retail grocery dealer in the world, has built up its chain of stores almost entirely by opening new stores.¹

Growth through acquisition and consolidation has not been a great factor of chain store expansion, for, as indicated above, only 11 per cent of the total number of new stores were acquired in this manner. Acquisitions as a whole were predominately of other chains rather than of independent stores.

A third method used in the growth and expansion of the chain organizations was, by the introduction of mass production and mass movement of goods. Most chains operate their own factories and warehouses, therefore they are able to produce and distribute merchandise at a cheaper rate than the independent dealers. They save on freight and storage expenses, therefore they can get the needed commodities into the hands of the consumers cheaper and at a great saving to all concerned.

The fourth, and perhaps the one method which caused most of the criticism by the smaller retailers, is the buying methods of the chains. Their ability to obtain goods at a much lower rate than their competitors gives them a decided advantage over the latter and is an outstanding feature in their growth and development.

1. Statement by the Company President in a hearing before FTC investigating committee.

In this manner they can obtain quantity discounts and other purchasing concessions which are not available to small dealers.

It was alleged by the complainants that chains used "threats and coercions" in obtaining buying privileges from manufacturers. The Federal Trade Commission¹ found that, from a total of 129 manufacturers questioned, 76 admitted that they gave preferential treatment in some form or other to chains. Thirty-three admitted that chains threatened to quit purchasing from them if special privileges were not granted. Twenty-three out of the thirty-three stated that they had yielded to the demands of the chains.

The question of whether or not the methods used by chains in obtaining their merchandise was illegal is not for us to decide here. Our purpose is to show that certain definite tactics were used by the majority of the group.

The duty of determining whether the policies and practices adopted by chain organizations was up to the courts, hence we will now examine the two existing statutes to determine what legal steps could be taken to regulate the alleged violations by chain organizations.

C. CHAIN ORGANIZATIONS UNDER THE SHERMAN ACT

The cases which have been brought into the courts charging chains with a violation of the Sherman Act were dismissed, for the courts found that they could not take jurisdiction. The provisions of this act does not permit the courts to take jurisdiction where there is an absence of evidence of an attempt to create a monopoly for the purpose of eliminating competition.

1. See FTC's Final Report on the Chain Store Investigation, p. 7

In the *Dahmke-Walker Milling Co. v Bondurant* (257 US 282) the court attempted to apply the "agency doctrine"¹. It established the facts that this chain organization operated a large warehouse from which it supplied its various local outlets, all of which were not within the bounds of one state. In applying the agency rule, the court sought to show that the local outlets were the agents of the parent company, and, as such, its acts were the same as those of the parent. In this manner the court sought to prove that the parent company was engaged in interstate commerce, thus susceptible to jurisdiction of the Sherman Act. The case was overruled for the facts did not support the agency charge.

The charge was made by the chain store critics that the size of the chain system, and the extent of control is exercised, made it a monopoly. The evidence to prove this charge was insufficient. By taking a particular chain organization operating in a particular section, one can establish facts to prove the existence of monopolistic conditions. The conditions would be confined to a particular section of the country, and therefore not susceptible to the Sherman Law. The Supreme Court, in ruling on such a point, stated that, "a concern may do all of the business in its field of operation and have no competition without infringing section 2 of the Sherman Act."² In the case of *US v International Harvester Company* (274 US 693) the court stated that, "the law does not make the mere size of a corporation or the existence of unexerted power on its part an

1. See also *Birdsney v Pathe Exchange Inc.* (257 US 282) and *Stratford v Wallace* (258 US 495) for interpretation of agency doctrine.
 2. Sec. 2 of Sherman Act Interpretation in *Stratford v Wallace*. *ibid*

offense, when unaccompanied by unlawful conduct in the exercise of its powers.

Because of the rulings in the above mentioned cases, the Federal Trade Commission concluded that the Sherman Act was not the type of Law needed to regulate chain store activity. With this in mind, we move now to the Clayton Act, to determine how it can be applied to chain store activities.

B. CHAIN STORES UNDER THE CLAYTON

In an examination of the provision of the Clayton Act, the Federal Trade Commission found that only section 2 and 7 could be applied to the chain store activity complained of.

Section 2 of the Clayton Act states that:

It shall be unlawful for any person engaged in commerce, in any transaction in or affecting such commerce, either directly or indirectly to discriminate unfairly or unjustly in price between different purchase of commodities, which commodities are sold for use, consumption, or resale within the United States or any territory thereof, etc.

The facts in the complaints issued to the commission against chain organizations¹ did not support the charge that chains used discriminatory prices to the extent to make it a violation of sec. 2 above. Although there existed differences in prices charged to chains, the courts could not establish jurisdiction of the cases at bar, therefore it was unable to analyze or decide upon them.

Section 7 deals with the acquisition and consolidation of the capital stock of one corporation by another. It states that:

1. opcit.

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It is unlawful for any corporation engaged in interstate commerce to acquire the capital stock of any other corporation likewise engaged where the effect may be to substantially lessen competition between them or tend to restrain such commerce in any community, or section of the country or tend to create a monopoly in any line of commerce.

A noteworthy feature of this section is, that there is no prohibition of acquisition by corporations of the physical properties of competing corporations.

The authority granted to the Commission by the Federal Trade Commission Act does not give it power to order a divestiture of the physical properties of a corporation even though they were acquired through the voting of stock acquired in violation of section 7 of the Clayton Act.¹

The established facts outlined above, shows that the small retailers could not obtain any legal support from the Clayton Act, therefore agitation for a new law, with provisions to cover the alleged wrongdoings of the chains, was begun.

The Federal Trade Commission submitted its final² report on the chain store investigation, December 14, 1934. This report substantiated many of the charges made by the American Retail Federation for the small retailers. The report confirmed facts that chains were engaged in unfair trade practices; that they secured special buying privileges, and sold merchandise at a price less than the independents could. Chains also took advantage of unlawful brokerage fees, and obtained numerous selling and advertising allowances which were not accorded to its competitors. The report outlined the weaknesses of the existing laws and recommended that amendments be made. Thus the groundwork for the Robinson-Patman Act was laid.

1. See Federal Trade Commission Act - discussed in Zorn and Feldman p. 101, also see *FTC v Roladam Co.* (285 US 643) and *Standard Oil v FTC.* (282 Fed. 81-87)

2. See conclusions in the final report of the FTC. (chapter 9)

CHAPTER II

THE ACT: ITS PURPOSE AND PROVISIONS

In the previous chapter we have indicated some of the economic conditions which formed the background to the Robinson-Patman Act. We presented facts to show that chains possessed large holdings and controlled a high percentage of the sales income from the retail field. It was noted that the methods used in acquiring these holdings were not always in strict conformity with fair business practices. The weaknesses of the two existing laws that regulated commerce and trade were pointed out. The conclusions of the Federal Trade Commission and its recommendations were also noted.

With this brief background, we turn now to a discussion of the Robinson-Patman Act and its provisions. A detailed treatment of all the provisions and problems created by the Act cannot be discussed at this time, however it is necessary to indicate the general aspects of the Statute preliminary to a treatment of those phases which I consider are relevant to the small retailer's problems.

THE ACT: (PUBLIC LAW NO. 692-...74th CONGRESS)

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), is amended to read as follows:

"Sec. 2 (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale

within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them": Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

Sec. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: Provided, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this

The first section of the report deals with the general situation of the country. It is a very interesting and informative study of the country's resources and potential. The author has done a great deal of research and has put together a very comprehensive picture of the country's situation. The report is well written and easy to read. It is a very valuable document for anyone interested in the country's development.

The second section of the report deals with the country's economic situation. It is a very detailed and thorough study of the country's economy. The author has done a great deal of research and has put together a very comprehensive picture of the country's economic situation. The report is well written and easy to read. It is a very valuable document for anyone interested in the country's economic development.

The third section of the report deals with the country's social situation. It is a very detailed and thorough study of the country's social situation. The author has done a great deal of research and has put together a very comprehensive picture of the country's social situation. The report is well written and easy to read. It is a very valuable document for anyone interested in the country's social development.

The fourth section of the report deals with the country's political situation. It is a very detailed and thorough study of the country's political situation. The author has done a great deal of research and has put together a very comprehensive picture of the country's political situation. The report is well written and easy to read. It is a very valuable document for anyone interested in the country's political development.

The fifth section of the report deals with the country's environmental situation. It is a very detailed and thorough study of the country's environmental situation. The author has done a great deal of research and has put together a very comprehensive picture of the country's environmental situation. The report is well written and easy to read. It is a very valuable document for anyone interested in the country's environmental development.

amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States, or to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.

Sec. 4. Nothing in this Act shall prevent a cooperative Association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Approved, June 19, 1936.

THE UNIVERSITY OF CHICAGO
CHICAGO, ILL. 60637
JANUARY 10, 1964

PROFESSOR JOHN H. COOPER
1100 S. MICHIGAN AVE.
CHICAGO, ILL. 60605

Dear Professor Cooper:

I have just received your letter of January 8, 1964, regarding the manuscript of "The Structure of the English Verb" which you have kindly sent me. I am very grateful to you for your interest in my work and for your helpful comments.

I am currently working on a revision of the manuscript and will be sending you a new draft as soon as it is ready. I have taken your suggestions into account and hope that the new version will be more satisfactory. I am also working on a new book, "The Structure of the English Noun", which I hope to complete by the end of the year. I will be sending you a copy of this book as soon as it is published.

Very truly yours,
J. R. Hayes

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A. ITS PURPOSES

The purpose of the Robinson-Patman Act is to further protect trade and commerce from the restraints and inequalities imposed by undue differences as between customers. "It is to preserve equality of opportunity to engage in trade wherein the rewards are apportioned on considerations such as, quality of goods, efficiency, industry and the like."¹ A direct and perhaps a more terse statement of its purposes is, "a law to stop sellers from unfairly discriminating between customers or double-crossing competitors with indirect concessions."²

The fundamental objectives of the law as intended by Congress are: that no buyer should be given any discriminatory price that will injure competition; that no buyer should receive any part of the commission normally paid to brokers; that allowances or payments for advertising and promotional work should not unfairly discriminate between customers, and that special services for customers such as the extension of credit must not discriminate between customers.³

In an analysis of the bill, Congressman Logan of the House Judiciary Committee, stated the following as a general objective for the Law, "it proposes to amend section 2 of the Clayton Act, so as to suppress more effectively discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them."⁴

1. Congressional Report Vol. 80 pp 3229 - 3230

2. Robinson-Patman guide book - forward

3. Zorn and Feldman-Business under New Price Laws - pp 379

4. House Judiciary Report No. 2287

B. ITS PROVISIONS

The first basic provision of the Robinson-Patman Act is that "prohibiting price discriminations between customers of a seller." This provision however, is subject to a number of modifications. It is designed to reach and regulate the competitive relations between a given seller and his different customers and to limit price differentials between them.¹ All differentials are not unlawful, for in the absence of the following circumstances the Law is inoperative²:

1. There must be a discrimination between two or more customers of the same seller.
2. The difference in price must be made in commodities of like grade and quality.
3. One of the purchases involved must be in interstate commerce.
4. The commodities involved must have been sold for use, consumption or resale within the United States or its possessions, and not for the purpose of export.
5. The transaction must involve the sale of commodities and not for the sales of services.
6. Even if the above factors are present, a discrimination is not unlawful, unless in addition to the foregoing, its effect may:
 - a. Substantially lessen competition in the line of commerce
 - b. Tend to create a monopoly in a line of commerce
 - c. Injure, destroy, or prevent competition:
 - (1) With the person who grants the discrimination
 - (2) With or among any of its customers
 - (3) With person who knowingly receives the discrimination.
 - (4) With or among any of his customers
 - (5) With or among the customers of either of them.

1. opcit.

2. opcit.

The first of these is the fact that the
 government has been unable to
 secure the necessary funds to
 carry out its policy of
 maintaining the value of the
 pound sterling at its pre-war
 level. This has led to a
 steady decline in the value of
 the pound since 1948, and
 has resulted in a loss of
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 its policy of maintaining the
 value of the pound at its
 pre-war level. This has led
 to a steady decline in the
 value of the pound since
 1948, and has resulted in a
 loss of confidence in the
 currency.

The presence of the basic elements, listed above, does not by itself make a price differential a violation of section 1(a). For a full description of the workings of this section, see chapter IV, paragraph A.

The brokerage provision is not original with the Robinson-Patman Act; it was included in the Clayton Act and had a bearing upon the payment of commissions and allowances by persons engaged in interstate commerce. It was written into the Robinson-Patman Act and the phrase, "except for services rendered" was added¹

This provision prohibits both the seller and the buyer from granting to or receiving from the opposite party either directly or indirectly, through the medium of a controlled agency any brokerage or commissions, "except for services rendered." Also it is directed against all discriminatory price reduction effected through the guise of brokerage discounts. For a clear description of how this section works see chapter IV, paragraph B. (infra).

The criminal provision of the Robinson-Patman Act is an entirely new feature and is not an amendment² of the Clayton Act. This provision was taken bodily from the Borah-Van Nuys bill, (S. 4741). It was incorporated in the Robinson-Patman Law as a criminal provision and makes three practices criminal.

They are:

1. Being a party to or assisting in any transaction of sale which discriminates, to the knowledge of the actor, against competitors of the purchaser by the granting of any allowance or advertising service charge to the purchaser which is not available to the purchaser's competitors at the time of the transaction in respect to the sale of goods of like grade, quality and quantity.

1. See text of the Act for other provisions (Paragraph 1 supra)
 2. This section of the R.P.A. is the original Borah-Van Nuys Bill.
 See explanation of Sec. 3. Vol. 80 cong. Record p. 9561.

2. Selling or contracting to sell goods in any part of the United States at a price lower than the vendor exacts elsewhere in the United States, when the same is "for the purpose of destroying competition.
3. Selling or contracting to sell goods at unreasonably low prices for the purpose of destroying competition, or eliminating the competitor.

CHAPTER III

ARGUMENTS FOR AND AGAINST THE ACT

In chapter I^I we have discussed the outstanding features of the Robinson-Patman Act. It is needless to say that some of them are controversial and, as such, have given rise to much comment both within congressional circles and by outside economic, business, and legal analysts. Some of the arguments both for and against this act are well founded and might well be the turning point in any case before the Commission. Evidence of this fact may be substantiated by a cursory reading of the rulings in cases already heard before the Federal Trade Commission and the Supreme Court. (See chapter IV *infra*)

This law, like many others, has lead to results which were not necessarily anticipated by its framers. These consequences are for the most part secondary in nature and are not fully substantiated by cases in evidence, but nevertheless I feel that the following list will reveal the basis for some of the arguments against the act:

1. Increase of distributor's brands at expense of manufacturer's brands.
2. Increase in buying to order on specifications
3. Adoption of other arrangements not strictly sales
4. Possible increase in prices for distributor's brands
5. Increase in manufacturing by distributors

-
1. Compiles from the various comments made in opposition to the act

6. Shifts in sources of supply:
 - a. Contracting by large buyers for entire output of small sellers
 - b. Choice by sellers between classes of customers (by function, quantity and method)
7. Encouragement to keep business within state lines
8. Switch to cooperative form of organization
9. Deliberate concealment of prices offered to competitors
10. Increase in the practice of confronting manufacturers with the lowest prices available to large buyers anywhere in the country.
11. Discrimination against small buyers, even though not required, increase in price on small quantities by widespread use of quantity discounts, also an intensified analysis of cost resulting from small scale transactions.
12. Requirement that all differentials be made on the basis of quantity and method, that is by character of buying rather than by character of customer's selling.
13. Reduction in the use of demonstrators and (push money for salesmen)² because of difficulty of promotional treatment
15. Prevention of variation in delivery service (either delivered or f.o.b. prices) legal, but may be requirements for uniformity on one side or the other.

1. See explanatory notes in appendix.

16. Practical necessity that discounts be uniform
17. Curtailment of activities of organizations specializing in buying
18. Discouragement of the use of company owned brokerage services (some of these offer a legitimate service to customers in the form of sales and costs research)

Another result that was hardly foreseen by the authors of this act in the loss of a reliable source of supply by small retailers; for some manufacturers have decided to confine their sales to one class of buyers rather than run the risk of violating some parts of this law. e.g. (Bird and Sons FTC rulings No. 2937. Others have chosen to concentrate risks on large customers only, or have increased costs to those sellers who solicit trade from small customers. Some manufacturers are able to dispose of their total productions through a single channel of distribution or class of customers. e.g. (through mail order houses or lar chain outlets).

The points listed above have arisen since the passage of the Act. Some of them were probably anticipated by critics of the Law, but to have prevented them would have required the inclusion of clauses which would have made the Act a rigid price and distribution control measure, rather than a regulator of business policies and practices.¹

In addition to the above named weaknesses, other criticisms were offered by members of the House Judiciary Committee in opposition speeches on the Act.²

1. For full discussion of the bill see report of House Judiciary-Report No. 2287, also see Congressional Record, Vol. 30, p. 9561
 2. See explanatory remarks by Congressman Utterback in Zorn & Feldman-Business under new price Laws. pp. 403-415.

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A. CONGRESSIONAL OPPOSITION

In a hearing before the House Judiciary Committee on the (new section 2 (a-f) and section 3) of the Robinson-Patman Act, Congressman Celler (author of the minority opposition) stated that he objected to the bill for:

"It contains many inconsistencies and courts will have a devil's own job to unravel the tangle. In an endeavor to get some sort of an agreement, the so-called Borah-Van Nuys provision of the Senate bill were grafted on to the House bill and we have what might be called in common parlance a 'hodge podge' bill and when you attempt to read them together you have the greatest difficulty."

In my opinion, the ambiguities referred to by the Congressman form the basis for many of the objections made by businessmen who seek to operate their enterprises within the meaning of the Robinson-Patman Law.

Speaking further in opposition to the bill, Congressman Celler said:

"this bill bears heavily against farmers and cooperatives, therefore the American Farm Bureau Federation, the National Grange, the National Cooperative Association and the Secretary of Agriculture have voiced emphatic opposition to the bill."

These groups mentioned by the Congressman, represent a large group of sellers who are directly affected by the "meet competition"¹ clause. The meet-competition clause was one of the obstacles to enforcement of the Clayton Act.² In the Robinson-Patman Act the trick wording "differing in method" phrase was added to it. This makes the Act more confusing, for this seems to outlaw legitimate quantity discounts. Senators Logan and Robinson have denied the accusation that section 2(a)

1. See explanatory notes.

2. Section 2 of the Clayton Act allows prices to be lowered to meet competition

outlaws quantity discounts, but their statements only go as far as the records in Congress and have had no weight in later decisions made by the Federal Trade Commission or the Supreme Court.¹

In opposition to section 2(c) and the words "except for services rendered, Congressman Celler said:

"that means if actual brokerage service is rendered it must be allowed and paid for; either must be reflected in price or discount allowance. Many respectable and honorable business houses have brokerage department or have organized separate entities which they may own in whole or in part and perform legitimate brokerage functions; which departments or entities expend money in research, investigation, experimentation, and advertising. Yet if they be directly or indirectly connected with the seller or buyer, no brokerage allowance may be made although in the language of the inserted words 'services' were rendered. We have come to a pretty pass in this country when a person cannot be paid for rendering legitimate services simply because he does not happen to be in a certain line of business. Under this same reasoning it would be quite logical to prohibit a store from altering garments for customers because he is not in the tailoring business, and if we continue on this road we will surely end up with legislations requiring the consumer to deal with tailors for certain work, independent automobile repairment for other things, and so on, and with companies unable to truck their own goods because there are separate trucking companies." (remarks by Congressman Celler before the House Judiciary Committee)

From the remarks made by the Congressman, one can get an idea why the Robinson-Patman Act has caused unrest among both buyers and sellers and forms the basis for other criticisms from outside sources.

B. OUTSIDE COMMENTS

The opposition voiced by some of the noted authorities suggests that the Act does not remedy the situation, but rather complicates it more so. For an example; Mr. E. P. Learned and Mr. Nathan Isaacs, in an article

1. See Congressional Records Vol. 80, pp 9561. also Zorn and Felman. opcit. pp. 414.

written for the Harvard Business Review¹, states that:

"the Robinson-Patman Act suffers from many causes of ambiguity: it pretends to be what it is not when it puts forward a check on competition in the guise of an antitrust law; it combines for the sake of compromise what are really two statutes independently developed without making any effort to render them consistent; it assumes a great many propositions about business practices, some of which are obviously untrue; and it attempts to extend the Federal power over matters that have heretofore been considered intrastate."

Notwithstanding the fact that the bill does contain two independently developed sections², I submit the thought that there did exist an evil in the form of abuse of competitive power and that the combining of these two bills was done with the desire to remove that evil.³

Mr. Learned and Mr. Isaacs further stated that:⁴

"this bill is based on the recognition that competition is not necessarily at all times and in all of its manifestations a social good. But while serving this major purpose an experiment of this kind must be carefully watched for its incidental results; its social and economic dislocations; its pressure upon businessmen to seek new escapes for the purpose of avoiding if not evading new pressures."

Another criticism of the Act was made by Dr. Willard L. Thorp.

In an article for Dunn's Monthly Review, he recognized the bill as a reaction to basic competitive relationships which have taken new aspects under the impact of the depression, thus he says that, "the Act is bewildering and confusing in many of its legal aspects however, it seems fairly clear in some of its broader economic implications and intentions. The immediate

1. Harvard Business Review -- pp. 158, Vol. 15

2. Robinson-Patman Act and the Borah-Van Nuys Bill. (combined)

3. Abuses consists of unlawful price discriminations and unearned brokerage fees.

4. Explanatory remarks by Cong. Utterback-Zorn and Feldman pp. 403.

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TO THE PRESIDENT OF THE UNIVERSITY OF CHICAGO
FROM THE FACULTY OF THE DIVISION OF THE PHYSICAL SCIENCES
The following members of the Faculty of the Division of the Physical Sciences
have signed this statement of opinion in regard to the proposed
amendment to the Constitution of the University of Chicago.

THE FACULTY OF THE DIVISION OF THE PHYSICAL SCIENCES

THE FACULTY OF THE DIVISION OF THE PHYSICAL SCIENCES
OF THE UNIVERSITY OF CHICAGO
HAS ADOPTED THE FOLLOWING RESOLUTION:

RESOLVED, That the Faculty of the Division of the Physical Sciences
of the University of Chicago, in its opinion, is of the opinion that
the proposed amendment to the Constitution of the University of Chicago
is not in the best interests of the University and should not be adopted.

ADOPTED AT A MEETING OF THE FACULTY OF THE DIVISION OF THE PHYSICAL SCIENCES

HELD AT CHICAGO, ILLINOIS, ON THE 15TH DAY OF MARCH, 1954.
ATTEST: THE SECRETARY OF THE FACULTY OF THE DIVISION OF THE PHYSICAL SCIENCES
OF THE UNIVERSITY OF CHICAGO.

THE PRESIDENT OF THE UNIVERSITY OF CHICAGO
THE FACULTY OF THE DIVISION OF THE PHYSICAL SCIENCES
OF THE UNIVERSITY OF CHICAGO

impact of the Law falls on the price structure. The behavior which it condemns is in the field of individual pricing policies."

The import of the above criticisms is that the Act is designed to correct the disorganized price structure, but, in doing so it involves other unrelated business policies thereby rendering it confusing and inapplicable to existing conditions.

Another notable criticism made by Dr. Thorp is that, "this Act will give the purchaser the right to know the price structure of the seller, and if such knowledge is withheld he can apply to the Federal Trade Commission for aid." This practice could prove detrimental to the harmonious relationship between the two groups.

The general opinion of the opposition is that they are in sympathy with the small retailer, for the evidence uncovered by the Federal Trade Commission proves that he is a victim of the aggressive powers of large competitors, but the opponents feel that the Robinson-Patman Act, unless administered wisely is "too ambiguous" to be helpful to them.

C. CONGRESSIONAL SUPPORT FOR THE ACT

It has been charged that the Robinson-Patman Act was the results of the efforts of a small group of narrowly interested wholesalers and lobbyists and a few uninformed lawyers. That charge is true in so far as the lobby work is concerned, nevertheless if many members of Congress had not sensed a widespread popularity of such a legislation among their constituents, it is unlikely that the lobby work would have attained its ends. Consequently the proponents of the Robinson-Patman Bill obtained

widespread support both in the House of Representatives and the Senate.

Speaking in defense of the Act before the House Judiciary Committee, Congressman Utterback stated that:

"The purpose of this proposed legislation is to restore, so far as possible, equality of opportunity in business by strengthening the antitrust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of the consumer, workers, independent producers, manufacturers, merchants and other businessmen."

The discrimination referred to by the Congressman as being unfair, consists of: price differentials on like brands, the sale of goods of like quality to large retailers at a cheaper rate than the charged smaller distributors, the unlawful use of private brands and a difference in quantity discounts allowed.

Section 2(a) of the Robinson Patman Act prohibits any practices whose result's is to substantially lessen competition for it states:

"where the effect of such discrimination maybe substantially to lessen competition of tend to create a monopoly a monopoly in the line of commerce, or injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

In explanation of this section, Senator Logan stated that, "section 2(a) attaches to competitive relations between a given seller and his several customers, and this clause is designed to extend its scope to discriminations between interstate and intrastate customers, as well as those purely intrastate."

The modifications of section 2(a) are expressed in the first provision of the Act¹, and reads, "that nothing herein shall prevent

1. Sec. 2(a) of the Robinson-Patman Act.

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differentials which make only due allowances in cost of manufacturing, sale or delivery resulting from offering method or quantities in which such commodities are to such purchasers sold are delivered."

This provision is designed to allow for some price differentials as indicated, but it is difficult to see how differences in cost can occur except by reason of "differing in methods or quantities in which commodities are made, sold and delivered." This provision seems to take away all of the power of section 2(a) thus making the entire section very confusing.

The main reason that agitation for the amendment to the Clayton Act arose out of the general belief among small retailers¹, that mass buyers in the field of distribution were obtaining lower prices from manufacturers by the use of pressure and inducement of large quantity orders². The manufacturers could not resist and in fact had become helpless under large order pressure and were therefore compelled to load their unabsorbed costs as well as their profits upon the smaller and less powerful customers.³

In the opinion of the proponents of the bill, this supposedly widespread unfair price discrimination was pricing the small merchants out of the business and tending to create monopoly by attempting to concentrate the distribution of merchandis in the hands of few.

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1. Final report of the FTC. (Conclusion)
 2. *ibid.*
 3. *ibid.*

CHAPTER IV

SOME LEADING CASES TRIED UNDER THE ROBINSON-PATMAN LAW

The duty of administering the Robinson-Patman Act is in the hands of the Federal Trade Commission. The Commission began its analysis of the controversial aspects of the Act by filing cases which involved facts that were essentially pertaining to the most debatable aspects of the Law.

The following are abbreviated reports of some of the formal cases¹ decided by the Commission. These are by no means all of the cases which have appeared before the Commission, but they are a sufficient number to indicate the nature of the unfairness in the policies and practices² for which the Robinson-Patman Act is designed to prohibit.

The first of these cases was a proceeding brought against the Kraft-Phoenix Corporation³, charging unlawful price discrimination in the use of quantity discounts and volume discounts in sales to retailers. The company granted a 5% discount on single purchases of \$5 or more and to group buyers who jointly purchases \$100.00 worth or more in a single week. The company also granted certain discounts on loaf cheese, depending upon the quantity purchased at one time.

It was shown that these discounts were available to all but the very smallest buyers. Any retailer, for example, who purchased

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1. Federal Trade Commission rulings
 2. See explanation in Chapter II, Par. A.
 3. *ibid.* Docket No. 3028

packaged cheese or salad dressing in quantities of more than \$5.00 each week was able to secure a discount of 5% below the price quoted to smaller buyers.

In dismissing this complaint the Commission based its ruling primarily upon the fact that the discounts in question and in quantities were too small to inflict any "perceptible" injury to competing retailers who did not receive this discount. Thus it was found that the maximum possible amount of discrimination against retailers who purchased less than \$5.00 weekly was \$6.50 annually. This amount, the Commission ruled, was too unsubstantial to give it any serious competitive advantage.

In addition to this finding the Commission also ruled that in all probability differences in cost were adequate to justify the discounts in question, under the cost proviso of section 2-A of the Act. The commission indicated that it would adopt a reasonable policy in the question of allocation of cost and would not require cost differences with mathematical precision. (see full report in FTC v Kraft Co. infra)

The second complaint was brought against Montgomery Ward and Co., Bird & Son, and the Bird Floor Covering Sales Corporation. The complaint in this case alleged that the two Bird concerns sold to Montgomery Ward Company, to wholesales, and to independent retailers. It charged that the prices charged to Montgomery Ward was lower than that to independent retailers by as much as 15% to 18%. The complaint was dismissed. The case turned squarely upon the question of cost justification. The Commission found that the saving in cost involved in dealing with Montgomery Ward & Co., as compared with independent retailers was, over 28% while the maximum discrimination was less than 20%.

The record in this case discloses, in addition, the occurrence of one of the anticipated effects¹ of the Robinson-Patman Act. The facts are; that sometime prior to the passage of the Act the two Bird Companies had commenced to curtail their dealings with the independent retailers. The enactment of the law apparently accelerated the development of this policy, and within a few months after its passage no goods were being sold direct to retailers while jobbers and mail-order houses were being quoted the same net prices. The Commission held that, the sales policy of the companies, in eliminating direct sales to retailers was an entirely proper exercise of the right of customer selection expressly granted by the Act.² (FTC v Bird and Montgomery Ward) Docket 2937.

The third case was a complaint brought against the Hollywood Hat Company, alleging that this company was charging a substantially lower price to one very large syndicate buyer than to any of its other customers, namely \$21.00 to \$36.00 a dozen to the syndicate and \$3.00 to \$6.00 a dozen more on the same hats to other buyers. The respondents made no attempt to justify this price difference on the basis of cost and, accordingly the commission issued a cease and desist order. The complaint also charged that the use of unfair methods of competition, included the substitution of cheaper hats for better ones without the knowledge or consent to buyers.

The interesting part of this case is the failure of the respondents to make any attempt to justify the price differences on the

1. This fact has been pointed out in Chapter III as one of the criticisms of the RPA.
 2. *ibid* pp 126.

basis of cost. The facts do not indicate that it would have been possible for them to have shown cost differences equal to the differences in price; nevertheless some differences undoubtedly existed. The fact that the FTC did not inquire into the cost differentials, indicates a policy that, "it will not decide upon facts that are not pleaded in defense." (FTC. v Hollywood Hat Co. Docket No. 3030).

The fourth case deals with what is probably the most controversial clause of the Act: section 2-C which prohibits the payment of brokerage by one party to the transaction, except for services rendered, to the other party to the same transaction or to any one under the control of the other party.¹

In this case, the complaint alleged that the Biddle Company acted as buying agent for a large number of concerns and that for these services received a substantial monthly fee from such concerns. In return for this fee the Biddle Company furnished its clients with detailed market information. It also acted as buying agent for these companies and purchased merchandise for their account from a large number of sellers. The sellers paid brokerage fees to Biddle, who in turn passed them on intact to its buying clients.

The Commission Ruled that in this case the payment of brokerage by these sellers to Biddle was violation of Section 2-C of the Act. It found that Biddle was under the control of its buying clients and that it did not render any services to the seller which would justify the payment of brokerage. The case turned largely upon the Commission's interpretation

1. Section 2-c of RPA.

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of the phrase, "except for services rendered." It sustained the view that no one under the control of the buyer could render sales services to the seller within the meaning of the section. The Commission stated further that "the services rendered by Biddle to sellers were incidental to the particular purchase and sale transaction and that such sales services were donated by the Biddle Company to the seller."

Biddle appealed to the circuit court, but the decision of the FTC was upheld. The ruling of the circuit court was that, "seller cannot pay brokerage to buyers or their representatives for selling services." (See circuit court's decision in the Biddle case - FTC v Biddle Purchasing Company- Docket 3072)

The Commission handed down the orders in the four cases reviewed above on July 19, 1937. In two of these cases, the complaints against the respondents were dismissed and in the other two, the cease and desist orders were issued. Each of these cases illustrates the Commission's attitude toward a different phase of the Act.

The following cases are divided into four main categories, namely, cases on price discrimination, cases involving brokerage questions, cases on discriminating with advertising money, and cases involving service discriminations. There will be given a sufficient number of facts in each case to enable the reader to recognize the problems involved. The ruling of the Federal Trade Commission will be cited after each set of facts, plus the writer's comments and in this manner, it is hoped that a definite conclusion can be made of the question of, "what can or cannot be done under the Robinson-Patman Act. These cases are not picked in

the sequence in which they appeared on the Commission's agenda but are chosen because the facts involved illustrates the Commission's interpretation of the different phases of the law.

A. CASES ON PRICE DISCRIMINATION

In the matter of H.C. Brill Company Inc. Docket No. 2935:

The Brill Manufacturing Company had a policy of allowing cumulative discounts on the basis of annual sales to large customers while disregarding the purchases made by smaller companies engaged in the same competitive business, and whose aggregate annual purchases was not very high, but some of their individual purchases exceeded those of the large companies.

The FTC held that, "discounts are unlawful when based on total purchases in any given period."

Comments¹: Large buyers often place small orders during a given period, but their aggregate volume far exceeds that of smaller buyers, thus according to Brill, the latter group is not entitled to discounts. The FTC overruled this contention and applied section 2 (a) provision 1 of the Robinson-Patman Act. The Commission's order establishes the fact that quantity discounts based on probable savings in the cost of manufacture, sale or delivery resulting from differing methods or quantities must be figured on individual transactions and not on total volume, and hopes for volume over an agreed period of time.² (see similar rulings in FTC v American Optical Company and FTC v Simmons Co.)

In the matter of the Master Lock Company:

The Master Lock Company granted a 5% additional discount to customers whose annual purchases exceeded \$10,000. This discount was predicated on the belief that this business was done at a lower cost than was the business taking less than \$10,000 per year.

1 Trade practice & price law. pp. 124 by John W. Horwood.

2 Comments of the author.

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The FTC held that, "discounts, based on cumulative orders over a period of time and granted retroactively to all purchasers when total reached \$10,000 in a year, are discriminatory."

Comments: The facts do not support the point contended for by the Lock Company, for customers taking less than \$10,000 annually frequently place larger individual orders than those taking more than this amount. There is no saving on the individual orders and no facts which support a differing in cost of manufacturing, sale or delivery charge, therefore retroactive discounts on this basis are discriminatory. (see FTC v A&P-
infra)

In the matter of the Sherwin-Williams Company:

Discrimination in the sale of paint is the charge against the Sherwin-Williams Company and two of its wholly-owned subsidiaries, Lowe Bros. Company and John Lucas and Company. The complaint states that the three granted quantity discounts by permitting main offices of some chain lumber yards to pool orders of unit stores; that a flat 10% discount was granted to some chain yards irrespective of the size of the order; that Sherwin-Williams accumulated orders of some of its distributors and dealers for a time sufficiently long enough to enable the buyers to earn maximum discounts on orders less than carload quantities.

The FTC held that, "delayed billings to special customers to get a greater quantity discount is illegal."

Comments: In addition to reestablishing the ruling held in the matter of the Master Lock Company, the Commission also applied section 2 (a) of the Robinson-Patman Act. This section states that, "no price differentials are permitted on goods of like quality and like grade."

In the matter of Champion Spark Plug Company:

Widely varying prices in the sale of spark plugs is charged by the FTC in its charge against the Champion Spark Plug Company. The FTC alleged that Champion sells its plugs to automobile manufacturers for original equipment at six cents per plug or less while prices charged to purchasers of like quality and grade, who recall or use them as replacement plugs range from twenty-three to thirty-one cents per plug. The price of six cents is less than the average cost to manufacture, sell and deliver. The Champion Company alleged that, the sale of its product in the replacement field depends largely on the extent to which his product is used for original equipment. Adoption of such an article on a well known automobile is great advertising value to the manufacturer.

The FTC held that, "A company cannot sell to some customers for less than cost, just to promote repeat orders."

Comments: Champion claimed that prices charged automobile manufacturers are to meet competition. This is legal; for according to the provisions of the Robinson-Patman Act, "prices may be lowered to meet competition." (adequate proof is necessary to sustain this charge) Price differentials are legal when justified by savings. (FTC v Bird Floor coverings, *supra*) Special prices to selected buyers are illegal when the buyers compete with each other. (FTC's order against the Window Glass Manufacturers Assn.) The FTC held that none of these decisions were applicable to the Champion Spark Plug Company's case.

The cases reviewed above are indicative of how the Federal Trade Commission interprets Section 2(a) of the Robinson-Patman Act¹ when applying it to cases involving price discrimination charges.

1. Price discrimination section.

*Cases where price discrimination is permitted: See explanatory notes in appendix.

B. CASES INVOLVING THE BROKERAGE QUESTION

It shall be unlawful to pay or receive a commission, brokerage or any other compensation, or anything in lieu thereof, to the other party to the transaction or to his agent, or to an intermediary directly or indirectly controlled by the other party. (section 2(c) of the Robinson-Patman Act) See full text of the Act in paragraph 2 of chapter II supra)

Section 2 (c) of the Robinson-Patman Act, or the "brokerage section," has been a controversial matter because so many buyers were operating their own brokerage affiliates, or receiving cash or other benefits from central buying organizations which were really representing buyers.

The Great Atlantic & Pacific Tea Company¹, being the dominant concern in the food business, showed an early interest in the brokerage section of the Act, because it operated several buying agencies and engaged in the practices which the Robinson-Patman Act declared unlawful. In a test case² before the FTC all of the questions pertaining to brokerage³ were brought up, and the Commission held that A&P's practices were a violation of the brokerage section and issued a cease and desist order. The A&P appealed to the Supreme Court. The Court upheld the decision of

1. FTC Docket No. 3031

2. Printer's Ink Feb. 18, 1936, p. 33

3. Allowances can be decent. . . .
ibid-Feb. 11, 1936, p. 17

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ORIGINAL ARTICLES
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The Federal Trade Commission.

The following is a list¹ of the Rulings of the brokerage section made by the Supreme Court in the A&P case.

1. Buyers can't be paid for services rendered in connection with purchasing²
2. Buyers may not be compensated for services performed by their agents
3. Buyers may not receive brokerage or anything in lieu thereof on own purchases
4. Brokerage for "services rendered" can be paid only to a bona fide agent of principal
5. Sellers who employ no brokers cannot violate the brokerage section
6. Seller who does not use any brokers has whatever price latitude is permitted by section 2(a)
7. Salesmen may represent several sellers and still be considered a salesman
8. An agency may be a broker for one company and a salesman for another³
9. Brokers who merchandise for own account are distributors or super-jobbers
10. Sellers depending on direct buyers may not pay brokerage on any sales
11. Cost plus contracts may require inclusion of brokerage as a cost
12. Representatives of buyers may not be paid for incidental services to the seller

1. Compiled from dicta in the matter of the Great Atlantic & Pacific Tea Co. v FTC (106 F (2d) 667 1939. cer. den. Jan. 16, 1940)

2. Facts may alter holding, if proven substantially

3. FTC may investigate to determine if this is done to evade the RFA

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13. No purchasing agent can claim brokerage for services to the seller
14. Sellers can't pay brokerage to buyers or their representatives for selling services
15. Nothing in the Law prevents buyers from employing their own brokers
16. It is illegal for the buyer to pay brokerage for the buyer
17. A company may not take brokerage on goods purchased for sale to its subsidiaries
18. Brokers representing seller can't give his commission to buyer
19. Brokerage subsidiary may not collect brokerage on sales made to a company controlling it
20. Produce jobber can't collect brokerage on sales to a wholesale business he controls
21. Brokers who merchandises on own account may continue as a regular broker on other lines
22. Brokers cannot sell goods for a principal on a basis of collecting overages
23. Seller's broker cannot legally pass any of his commission to the buyer
24. Seller employing brokers may not concede brokerage to meet competition¹
25. Sellers cannot sell through brokers in one territory and concede brokerage to buyers in another
26. Packers may use different methods to sell different commodities
27. It is illegal to pass brokerage on accommodation sales
28. Buyers are not guilty of violation just because the original packer broke the Law
29. Good faith may be a deciding factor in determining when the Law is inadvertently violated

1. For a full discussion of the brokerage section, see 88 University of Penna. Law Rev. 731-746, 1940. also see Biddle Purchasing Co. v FTC, 96 F (2d) 687, 1939, Oliver Bros. v FTC, 102 F(2d) 263, 1939, and International Shoe Co. v FTC 280 US 298

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30. It is unnecessary to prove injury to competition under brokerage section

C. CASES ON DISCRIMINATING WITH ADVERTISING MONEY

Section 2(d) of the Robinson-Patman Act states that:

It shall be unlawful to pay anything to a customer as compensation for services or facilities furnished by such customer unless such payment is available on proportionally equal terms to all other competing customers

(see full text of the act in Chapter II supra)

The following is a list¹ of the Rulings on section 2 (d) made by the Federal Trade Commission in cases wherein the question of discriminating in advertising money has arisen.²

1. Payments for advertising must be for bona fide value and not discriminatory
2. Payments for advertising a product must be offered on proportionally equal terms
3. Percentage allowances must be available to customers able and willing to perform
4. Payments for promotion are not allowances in lieu of brokerage
5. Advertising allowances should not reflect brokerage
6. Advertising allowances must be in proportion to the value of services rendered
7. Manufacturers must make his contracts and his promotional payments available to all who can perform the services
8. Payments for promotion is determined by the value to the manufacturer

-
1. The facts are omitted; the question of discriminating in advertising money usually arises as a side question in a case at the bar on some other counts.
 2. The cases in which the above instructions were given are:
 Oliver Bros. v FTC, supra
 Kraft Cheese Co. v FTC, supra
 A & P v FTC, supra

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RESEARCH REPORT

THE REACTION OF HYDROGEN PEROXIDE WITH
SODIUM HYDROGEN SULFATE

BY J. H. HARRIS

RECEIVED JANUARY 15, 1954

ABSTRACT: The reaction of hydrogen peroxide with sodium hydrogen sulfate has been studied in aqueous solution at various temperatures and concentrations. The reaction is first order in hydrogen peroxide and first order in sodium hydrogen sulfate. The rate of reaction increases with increasing temperature and increasing concentration of both reactants.

INTRODUCTION: The reaction of hydrogen peroxide with sodium hydrogen sulfate has been studied in aqueous solution at various temperatures and concentrations. The reaction is first order in hydrogen peroxide and first order in sodium hydrogen sulfate. The rate of reaction increases with increasing temperature and increasing concentration of both reactants.

EXPERIMENTAL: The reaction of hydrogen peroxide with sodium hydrogen sulfate has been studied in aqueous solution at various temperatures and concentrations. The reaction is first order in hydrogen peroxide and first order in sodium hydrogen sulfate. The rate of reaction increases with increasing temperature and increasing concentration of both reactants.

RESULTS AND DISCUSSION: The reaction of hydrogen peroxide with sodium hydrogen sulfate has been studied in aqueous solution at various temperatures and concentrations. The reaction is first order in hydrogen peroxide and first order in sodium hydrogen sulfate. The rate of reaction increases with increasing temperature and increasing concentration of both reactants.

CONCLUSIONS: The reaction of hydrogen peroxide with sodium hydrogen sulfate has been studied in aqueous solution at various temperatures and concentrations. The reaction is first order in hydrogen peroxide and first order in sodium hydrogen sulfate. The rate of reaction increases with increasing temperature and increasing concentration of both reactants.

REFERENCES: The reaction of hydrogen peroxide with sodium hydrogen sulfate has been studied in aqueous solution at various temperatures and concentrations. The reaction is first order in hydrogen peroxide and first order in sodium hydrogen sulfate. The rate of reaction increases with increasing temperature and increasing concentration of both reactants.

ACKNOWLEDGMENTS: The reaction of hydrogen peroxide with sodium hydrogen sulfate has been studied in aqueous solution at various temperatures and concentrations. The reaction is first order in hydrogen peroxide and first order in sodium hydrogen sulfate. The rate of reaction increases with increasing temperature and increasing concentration of both reactants.

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LITERATURE CITED: The reaction of hydrogen peroxide with sodium hydrogen sulfate has been studied in aqueous solution at various temperatures and concentrations. The reaction is first order in hydrogen peroxide and first order in sodium hydrogen sulfate. The rate of reaction increases with increasing temperature and increasing concentration of both reactants.

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THE REACTION OF HYDROGEN PEROXIDE WITH SODIUM HYDROGEN SULFATE

BY J. H. HARRIS

9. Payments must be proportionally equal only when customers are in competition

D. DISCRIMINATING IN SERVICES

Section 2 (e) of the Robinson-Patman Act states that:

It shall be unlawful to discriminate in favor of one purchaser against another by furnishing any services or facilities not accorded to all purchasers on proportionally equal terms. (see text of act chapter II supra)

The following is a list of the Rulings on section 2(e) made by the Federal Trade Commission in cases wherein the question of discriminating in services has arisen.¹

1. It is unnecessary to prove injury to competition under the services section (section 2 (e))
2. Customers must be treated alike when allowing delivery charges
3. Must give special allowances for special services to all competing customers
4. Special payments to wholesalers must be offered on proportionally equal terms
5. It is illegal to discriminate between buyers by furnishing some with different sized packages
6. Demonstrators must be furnished on a proportionally equal basis
7. Cash discounts and terms of sale must apply equally to all customers
8. Seller cannot discriminate by delivering to one and forcing competitor to pay freight

-
1. The facts are omitted; the cases in which the above instructions were given are:
 Oliver Bros. v FTC, supra
 C.F. Sauer Co. v FTC
 FTC v General Motors and AC Spark Plug Co.
 FTC v. Luxor Ltd.
 A & P. v FTC, supra

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CHAPTER V

SUMMARY AND CONCLUSION

The Robinson-Patman Act is not a completely new type of governmental regulation of business. It represents, instead, an attempt to define and amplify the price discrimination section of the Clayton Act. As an amendment to this Act, which has been on the statute books since 1914, the Robinson-Patman Act becomes an intergral part of the anti-trust laws.

The groundwork for this Act was laid in an investigation of the chain store practices conducted by the Federal Trade Commission. Congress had become increasingly concerned over the distress among small dealers which resulted from the rapid growth of the chain stores and over the huge concentration of buying power in the hands of a few corporations.

The American Retail Federation took a leading part in the preparation and agitation for the passage of the Robinson-Patman Act. Some commentators charged that it was the influence of this group that started the agitation against chain organizations. I cannot say whether or not this is true, but the evidence shows that there was a widespread feeling throughout the country that the tremendous growth of chain store organizations was a social and economic evil which must be curbed. The facts uncovered by the Federal Trade Commission supported this feeling, thus I say that, sentiment was one of the major factors influencing Congress to pass this law.

The general feeling by the public, that big business, as such, was bad, and that it is rapidly destroying the small merchants, has existed in this country since 1890. The Sherman Act was passed because of the

The Board of Directors of the [Name of the Corporation] has the honor to acknowledge the receipt of the [Name of the Document] from the [Name of the Person/Entity] and to express its appreciation for the [Name of the Document] and the [Name of the Person/Entity] who has [Name of the Action] in [Name of the Location] on [Name of the Date].

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fear of monopolies. It was an attack on "bigness" in selling, but by 1928 the focus had shifted from bigness in selling to bigness in buying. The Robinson-Patman Act was passed to control the latter so-called evil. This Act is largely an expression of fear on the part of the small retailer, rather than a political whim of a single trade association.

The purposes and provisions discussed in chapter II of this study, may here be summarized as four fundamental or main objectives. They are to provide for:

1. an equitable basis for customer classification
2. Uniform treatment for all customers falling within a given classification
3. elimination of pseudo-brokerage, and
4. equal treatment of buyers in receipt of merchandising services and allowances from sellers

The criticisms of the Act presented in chapter III have some merit, for example, the charge made by Congressman Celler that, "the bill contains many inconsistencies," is well founded, for a cursory reading of section 2(a) of the act will not give one a clear picture of its intent and meanings if he is not well aware of the circumstances preceding the passage of this Law. Another confusing aspect of the Act is the inclusion of the Borah-Van Nuys' bill (section III). The wording of this section, in many respects, duplicates that of section 2, but it includes a penalty for violations. To read the two sections together and get a clear meaning requires the help of an authority on the Act.

Nevertheless the above ambiguities have been overcome by a careful analysis by the Supreme Court and the Federal Trade Commission.

In the cases tried under the Act, by these two authorities, all controversial points pertaining to it have been discussed. In this study I have presented those cases which I feel contained the most controversial issues, and listed the cans and cannots under each major section.

CONCLUSION

The theory behind the passage of the Robinson-Patman Act lay in the general belief that "big business", as such, was bad, and was forcing the small retailer out of the distribution market. The evidence available does not reveal the extent to which this was done. There are figures to show the actual size of the chain store systems and the percentage of the total retail sales which they commanded at the time the agitation for the passage of this Law began. There are no figures to show the actual number of small failures that came about as a direct result of chain store expansion, nor has it been adequately proved that the business practices of chain organizations have directly affected the survival of the small retailer.

The proponents of the bill based their arguments on the statement, that chain stores promoted unfair competition; that they obtained special buying concessions, and received commissions and allowances which were not actually earned. They stated further that, by the use of coercive methods, chains have forced manufacturers to sell to them below the cost to manufacture and deliver, and by so doing, forced the latter to transfer his unabsorbed costs to the small retailer's account, thereby working a hardship upon him. Evidence to prove this charge, if sufficiently

convincing, would be grounds for the passage of a law outlawing such practices, however, as pointed out in chapter I (supra), only thirty-three manufacturers have admitted that chains used coercion and none have stated that they were forced to transfer costs to small retailers.

The expansion of chain-store systems was accomplished largely by opening of new stores, rather than the acquisition of independent stores already in operation under other management. Mass production and mass movement of goods from their own warehouses to their local outlets have resulted in enormous savings to the chains, therefore they were able to expand rapidly; offer additional services to the customers and maintain a wide assortment of merchandise. Through rapid turnover of inventories they have been able to sell at a price lower than their independent competitors, thus they have secured much trade that would have ordinarily gone to the independents.

The Robinson-Patman Act has for its purposes the prohibition of price discrimination; the elimination of unearned brokerage commissions; the use of coercion and threats to secure price differentials, and the unlawful acquisition of quantity and other discounts. In this study we have assumed that these practices existed among chains, therefore we have proceeded to show how the provisions of this Act accomplishes this end, for herein lies the only justification for this type of law.

We have discussed the provisions of the act and presented some of the pro and con arguments about it. This was done in order to reveal the controversial aspect involved, and to show how they have been

interpreted. We have listed the cans and cannots as interpreted by the Supreme Court and the Federal Trade Commission, so that the reader can get an idea of what each of the various provisions intend to regulate.

Our conclusion is that the Robinson-Patman Act is a regulator of business policies and practices as between large and small retailers. It promotes uniformity in buying and selling practices thereby permitting free competition to exist.

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Section 1

1. The first section of the report deals with the general situation of the country. It is a very interesting and informative chapter, which gives a clear picture of the country's position in the world. The author has done a great deal of research, and his conclusions are well founded. The chapter is well written, and is a pleasure to read. It is a very good example of what a report should be like.

Section 2

2. The second section of the report deals with the economic situation of the country. It is a very interesting and informative chapter, which gives a clear picture of the country's economic position in the world. The author has done a great deal of research, and his conclusions are well founded. The chapter is well written, and is a pleasure to read. It is a very good example of what a report should be like.

3. The third section of the report deals with the social situation of the country. It is a very interesting and informative chapter, which gives a clear picture of the country's social position in the world. The author has done a great deal of research, and his conclusions are well founded. The chapter is well written, and is a pleasure to read. It is a very good example of what a report should be like.

4. The fourth section of the report deals with the political situation of the country. It is a very interesting and informative chapter, which gives a clear picture of the country's political position in the world. The author has done a great deal of research, and his conclusions are well founded. The chapter is well written, and is a pleasure to read. It is a very good example of what a report should be like.

5. The fifth section of the report deals with the cultural situation of the country. It is a very interesting and informative chapter, which gives a clear picture of the country's cultural position in the world. The author has done a great deal of research, and his conclusions are well founded. The chapter is well written, and is a pleasure to read. It is a very good example of what a report should be like.

6. The sixth section of the report deals with the environmental situation of the country. It is a very interesting and informative chapter, which gives a clear picture of the country's environmental position in the world. The author has done a great deal of research, and his conclusions are well founded. The chapter is well written, and is a pleasure to read. It is a very good example of what a report should be like.

7. The seventh section of the report deals with the international situation of the country. It is a very interesting and informative chapter, which gives a clear picture of the country's international position in the world. The author has done a great deal of research, and his conclusions are well founded. The chapter is well written, and is a pleasure to read. It is a very good example of what a report should be like.

8. The eighth section of the report deals with the future of the country. It is a very interesting and informative chapter, which gives a clear picture of the country's future position in the world. The author has done a great deal of research, and his conclusions are well founded. The chapter is well written, and is a pleasure to read. It is a very good example of what a report should be like.

9. The ninth section of the report deals with the conclusion of the report. It is a very interesting and informative chapter, which gives a clear picture of the country's conclusion in the world. The author has done a great deal of research, and his conclusions are well founded. The chapter is well written, and is a pleasure to read. It is a very good example of what a report should be like.

10. The tenth section of the report deals with the appendix of the report. It is a very interesting and informative chapter, which gives a clear picture of the country's appendix in the world. The author has done a great deal of research, and his conclusions are well founded. The chapter is well written, and is a pleasure to read. It is a very good example of what a report should be like.

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Terms and Explanatory Notes

PROPORTIONATELY EQUAL TERMS: If a seller grants an allowance to one customer he should grant the same to another, if purchases are under identical circumstances; based upon the quantity of the purchase.

PUSH MONEY: Allowances given to salesmen who pass it out to their customers to promote sales.

QUALITY DIFFERENCES: The act recognizes that there are certain types of price differences which are not discriminating. Thus discrimination can only occur in the sale of goods of "like quality and grade."

MEET COMPETITION: The defendant may show as evidence that he cut prices to meet competition. This is not an absolute defense even if a justifiable meeting of competition is shown.

CUSTOMERCLASSIFICATION: The device of classifying customers by size of potential business, giving each class an over-all discount with each succeeding higher bracket.

DISCRIMINATION: As declared by the Robinson-Patman Act Sect. 2(a) "it is an unlawful dealing with (sellers or buyers) in a manner to injure competition in any line of commerce etc."

Notes

Permissible price discriminations occur where traceable savings in cost to manufacture, sale, or delivery when these can be shown to result from different methods of quantities in which the commodity is sold or delivered to different customers. (subsection (a) of RPA.) (see also Lawful discriminations under the Robinson-Patman Act - Dunn's Monthly Review pp. 6-8, Oct. 1936.)

Discriminatory price cutting means the cutting of prices in selected spots and to selected groups of buyers. It may be undertaken merely to increase trade, or to crush competition. The most striking examples of price cutting to crush competition are found in the petroleum refining companies. (FTC v Standard Oil Co. 282 Fed. 81, 87.) TNEC (Temporary National Economic Committee) report on the Meat-packing Industry. . . Part I pp. 68.

Justifiable rebates have been made but in the notorious case of the Standard Oil Co. (supra) the railroads granted Mr. Rockefeller a price much lower than that charged his competitors or made rebates when higher prices was charged. (See Boman & Bach...Economic Analysis and Price Policies...Section on price discrimination).



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Small retailer and the
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